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No. 05-1533

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SUPREME COURT U.S.

IN THE

Supreme Court of the United States

GIFFORD BROTHERS SAND AND GRAVEL, INC.,

Petitioner,

v.

ZONING BOARD OF APPEALS OF BARNSTABLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS APPEALS COURT

RESPONDENT, TOWN OF BARNSTABLE'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is there a compelling issue presented that warrants this Court's further examination of a matter that should be decided on a state's principles of zoning law?

II. Where the Supreme Judicial Court of Massachusetts exercised its discretion to deny an application for Further Appellate Review filed two years and nine months late, should that exercise of discretion be reversed?

III. Where no motion for new trial has ever been presented to the Trial Court, should this relief now be granted by this Court?

IV. To the extent that enforcement of a valid residential zoning ordinance puts an end to an illegal commercial use of a property, does this amount to an inverse condemnation of the property?

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TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

JURISDICTION OF THE COURT 1

STATEMENT OF THE CASE 2

A. Substantive Background 2

B. Procedural Background 4

C. Factual Inaccuracies and Clarifications 7

REASONS TO DENY THE PETITION 9

I. The Decisions Of The Supreme Judicial Court And Appeals Court Of The Commonwealth Of Massachusetts Are Entitled To A High Degree Of Deference. 9

A. The granting of a FAR Application must be founded on upon substantial reasons affecting the public interest or the interests of justice. 10

B. Whether ruling on the merits or on the Petitioner's procedural lapses, the Supreme Judicial Court exercised its FAR discretion reasonably. 11

1. Substantively, the validity of a zoning enactment in Massachusetts that breaks an entire town into two zoning districts, business and residential, is well settled and in accord with the Appeals Court decision in this matter. 11

2. Procedurally, rejecting a FAR application presented two years and nine months late is certainly within the proper exercise of the Supreme Judicial Court's discretion. 12

3. Procedurally, a late motion for re-hearing with the State Appeals Court would justify both the Appeals Court denial of the motion and the refusal of the Supreme Judicial Court to further review the matter. 13

II. Petitioner's Demand Amounts To A Motion For A New Trial. It Is Seven Years Late And Unsupported. 14

A. There is no record to support the assertion that "new" evidence offered by affidavit could not have been discovered before trial. 15

B. Even if timely presented, the "new evidence" proffered affidavits would not support a motion for new trial. 16

C. Incompetence of Trial Counsel: Even with no express time constraints to raise this matter, the trial judge has never been asked to do so. 17

III. Neither Enactment Nor Enforcement Of A Valid Zoning Ordinance Is A Taking. 18

A. Adopting town-wide zoning that prohibits certain activities is clearly a permissible undertaking. 18

B. Affirming the ban of commercial activities on locus is neither a taking nor an inverse condemnation. 18

C. The taking claim is not ripe because there has been neither pursuit nor denial of just compensation. 19

D. It is factually untrue that Petitioner has no other uses for its property. 19

E. Petitioner has not pursued or exhausted its range of remedies that would infuse value into its property. 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES:

Brown v. Penn. R.R., 282 F.2d 522 (3rd Cir. 1960), cert. denied 365 U.S. 818, 81 S. Ct. 690, 5 L.Ed.2d 696 (1961) 16

Cheang-Kee v. United States, 70 U.S. 320 (1865) 9

Daddario v. Cape Cod Commission, 425 Mass. 411 (1997) 18

Farmers Co-operative Elevator Association v. Strand, 382 F.2d 224 (8th Cir. 1978) 15

Flett v. W.A. Alexander & Co., 302 F. 2d 321(7th Cir.), *cert. denied* 371 U.S. 841, 83 S. Ct. 71, 9 L.Ed.2d 77 (1962) 15

Gage v. Egremont,
409 Mass 345, 566 N.E. 2d 1597 (1991) 11

Giordano v. McCartney,
385 F.2d 154 (3rd Cir. 1967) 16

MacDonald, Sommer & Frates v. County of Yolo,
477 U.S. 340 (1986) 20

Marietta Realty, Inc. v. Springfield Redevelopment
Authority, 902 F. Supp. 310
(D. Mass. 1995) 19

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 20

Penn Central Transportation Co. v.
New York City, 438 U.S. 104 (1978) 18

Village of Euclid, Ohio v. Amber Realty Co.,
272 U.S. 365 (1926) 18

Williamson County Regional Planning Commission
v. Hamilton Bank, 473 U.S. 172 (1985) 19

RULES:

Massachusetts Rules of Appellate Procedure

Rule 27.1 .....6, 7, 10, 12

Massachusetts Rules of Civil Procedure

Rule 60(b) 14, 17

Supreme Court Rule 15(2) 7

JURISDICTION OF THE COURT

The Petitioner's jurisdictional statement is incomplete in two vital respects and therefore potentially misleading.

Petitioner filed a single motion in the Commonwealth's Appeals Court to Extend Time to File a Petition for Rehearing and for Leave to File an Application for Further Appellate Review with the Commonwealth's Supreme Judicial Court (Appeals Court docket, Respondent's Appendix D, pp. 15a-20a)[1]. The Appeals Court did two things.

First, the Appeals Court extended the time to file for re-hearing, directing that Petitioner do so by December 19, 2002. Petitioner failed to comply with that order. However, a Petition for Re-hearing was filed on December 20, 2002, one day late. The Appeals Court then denied the Petition without comment.

Secondly, the state Appeals Court notified petitioner's current counsel that any petition for Further Appellate Review (FAR) would need to be filed directly with the Commonwealth's Supreme Judicial Court. On December 11, 2002, counsel announced in a letter to the Clerk of the Supreme Judicial Court that he intended to do so[2].

Nevertheless, nothing (no FAR Application, no motion to extend the time for filing a FAR, no motion for extraordinary relief given co-counsel's alleged incapacity, no motion to withdraw appearance, and

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[1] For clarity, references to Appendix items in Respondent's Brief will be referred to as "R. App, etc". Reference to such items in Petitioner's Brief will be referred to as, simply, "App., etc.)

[2] In a letter dated December 11, 2002 directed to the Clerk of the Supreme Judicial Court (R. App. A, pp. 1a-2a), current counsel for the Petitioner stated in part, "I am writing to confirm the above because at this time it is my intent to file a Rule 27 petition for rehearing and a Rule 27.1 application for further appellate review."

apparently no timely or effective follow-up with alleged successor counsel ... in short, nothing) was done, filed, requested, or advanced for two years and nine months after the required twenty-day deadline for filing a FAR petition.

Finally, on October 7, 2005, a Motion to File a FAR Application Late, accompanied by the FAR application itself, was docketed in the Supreme Judicial Court which denied the Application without comment on December 21, 2005 (R. App. E, pp. 21a-23a).

STATEMENT OF THE CASE

A. Substantive Background

This is a routine zoning case that focuses on Petitioner's mining of sand and gravel on a 16.6 acre parcel in a residential zone. Having received a cease and desist order from the Town, the petitioner appealed the order to the Town's Zoning Board of Appeals on the theory that the commercial use of the property was a protected, non-conforming use.

In 1929, Barnstable enacted its first zoning by-law that created two zones, business and residential. The business zone consisted of all properties that were then devoted to business use. The residential zone consisted of all remaining property in town (App. A: pp. 2a – 3a; App. B, pp. 11a-12a).

In 1956, Barnstable revised the zoning by-law, placing locus entirely in a residential zone, a classification that continues to date (App. A: pp. 2a; App. B: p. 12a).

The outcome of the action is dependant on the validity of the 1929 zoning enactment. If valid, all of Petitioner's commercial activities are illegal. On the other hand, if the 1929 by-law is invalid, the 1956 by-law controls; however, only that portion of Petitioner's

property devoted to mining activities in 1956 is protected as a non-conforming use.

The trial court found as fact that locus was virgin land until about 1947 when commercial activity began (App. B: p. 8a - #4). At that time, Petitioner's predecessor in title began to operate a sand and gravel pit, a contractor's storage yard, and a junkyard on portions of a 16.6 acre site (App. B: pp. 8a-10a). At trial, Petitioner presented little or no evidence concerning pre-1929 use[3] and the trial court made no findings as to pre-1929 use (App. B: pp. 7a-14a).

The trial court found that until about 1996, the mining operation occupied, at most, about five acres of the property (App. B: p. 21a). In 1996, Petitioner greatly expanded mining operations (App. B: p. 10a).

Having ruled that the 1956 by-law was controlling, the trial judge next addressed the physical extent and character of the non-conforming mining use. As a matter of law, he therefore limited mining to the five acre site in use before the 1956 by-law enactment. He did so even as he acknowledged that the five acres had been effectively stripped of all of its resources and that Petitioner would thus be left with the ephemeral right to mine only "air" (App. B: p. 24a).

In related rulings, the trial court rejected Petitioner's argument that the property owner's intent to mine the whole property should control to allow expansion of the protected non-conforming use. To the contrary, the trial court found as fact that not only had no such intent been proven, but that a clear contrary intent had been shown (App. B: pp. 9a, 17a).

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[3] This was apparently a tactical decision made by trial counsel, given the trial judge's focus in a pre-trial conference on the 1956 by-law. See a discussion of the issue at paragraphs 21-22 in Petitioner's Motion to Enlarge Time (R. App. B, pp. 3a-9a) filed with the Supreme Judicial Court in October 2005.

Petitioner's intent argument was therefore rejected (App. B: pp. 21a-22a).

Petitioner alternatively argued at trial that the mining should be allowed on all of locus on a so-called "diminishing assets" theory of law adopted in some jurisdictions but previously rejected in Massachusetts (App. B: pp. 20a-21a). Because of the violence that this theory of law would wreak on the residential zoning scheme in general and the immediate residential neighbors in particular, the trial court declined to adopt Petitioner's "diminishing assets" argument to justify expansion of the supposed legal non-conforming mining use (App. B: pp. 18a-21a).

The Commonwealth's Appeals Court overruled the trial court and found that the 1929 enactment was a validly adopted and enforceable by-law (App. A: p. 5a). Absent appropriate variances or other zoning relief, the Appeals Court ruled that all mining operations and other commercial activity begun on this virgin parcel in 1947 were illegal (App. A: p. 5a). Lacking any such exception, mining sand and gravel from locus was at all relevant times an illegal commercial enterprise. Having so ruled, the Appeals Court found it unnecessary to address Petitioner's remaining arguments.

Neither outcome is acceptable to Petitioner as his mining activities by operation of law or fact have come to an end.

B. Procedural Background

Both the denial of Petitioner's motion for re-hearing in the Appeals Court and the Supreme Judicial Court's denial of the motion for Further Appellate Review were summary in nature and unexplained. Because the outcome at the State level could well have been based on Petitioner's procedural failings, a

statement of this case would be incomplete without a brief recitation of critical procedural history at the state level.

The genesis of this matter stems from a cease and desist order issued by Barnstable's zoning enforcement officer on October 22, 1997. Barnstable's Zoning Board of Appeals denied the Petitioner's appeal after hearing in a decision dated January 27, 1998. Petitioner's complaint was timely filed with the trial court in February of 1998, followed by a pre-trial conference and filing of memoranda in December 1998 (R. App. C, pp. 10a-14a). A jury-waived trial lasting approximately three days commenced in April 1999 followed by the trial court's findings and rulings in June 1999. After a motion to alter the judgment was denied, cross appeals were filed, the record assembled, the case entered in the Appeals Court in April of 2000, Petitioner's brief filed in October 2000, and oral argument held in May of 2002.

It is important to note that throughout this entire five year period, Petitioner was represented very vigorously by Attorney Gregory M. Downs who briefed and tried this matter in the lower court. Subsequently, Attorney James W. Stathopolous, Petitioner's counsel in the instant proceedings, filed his appearance as co-counsel in the state Appeals Court matter; both Messrs. Downs and Stathopolous appeared for oral argument before the Appeals Court while the latter actually argued the matter to the panel.

In its Appeals Court brief, the Petitioner identified three issues for the Court's consideration. First, it asked, "Whether the trial court erred in limiting the area of continued operation of the sand a gravel pit based on the uncontroverted testimony showing a clear intent of the property owner to use the entire parcel at the time the applicable zoning went into effect?" Secondly, it asked, "Whether the diminishing assets theory of the majority of jurisdictions should be

adopted by the Commonwealth when dealing with 'an assets extraction prior non-conforming use'"? Thirdly, Petitioner argued that trial court's findings and rulings with respect to the 1929 by-law should be upheld. Those are the only issues argued and briefed for the Appeals Court and it was upon those arguments that the Appeals Court expressly ruled.

The decision of the Commonwealth's Appeals Court was rendered on October 28, 2002. Petitioner then filed a motion in the Appeals Court to extend the time to file a motion for rehearing before the Appeals Court and for leave to file an application for Further Appellate Review (FAR) with the state's highest court, the Supreme Judicial Court. The Appeals Court allowed the motion to file for rehearing late and directed counsel to file the motion for rehearing by December 19, 2002.

In the same order, Petitioner was directed to file its intended Application for Further Appellate Review (FAR) directly with the Supreme Judicial Court (R. App. D, p. 19a, notation #16).

However, contrary to the Court's order, the motion for rehearing was not filed until December 20, 2002, one day after the deadline. Without hearing and without further explaining its reasoning, the Appeals Court denied the motion for re-hearing.

Thereafter, no pleadings of any sort were filed with any court until October 7, 2005 when a motion to file FAR application late and the FAR application itself were filed with the Commonwealth's Supreme Judicial Court (R. App. E, p. 21a).

It is particularly noteworthy that two years, nine months, and twenty-eight days had elapsed from the Appeals Court's denial of Petitioner's motion for rehearing until the FAR filing. It is equally noteworthy that Rule 27.1 (a) of the Massachusetts Rules of Appellate Procedure requires that a FAR application

be filed within twenty (20) days of the rescript of the Appeals Court[4]. Thus, on December 21, 2005, the Supreme Judicial Court denied the FAR application without comment.

C. Factual Inaccuracies and Clarifications

Pursuant to the requirements of Sup. Ct. R. 15 (2), the Respondent Town wishes to correct a number of factual misstatements in Petitioner's brief, as follows:

1. The evidence at trial supports the conclusion that commercial mining began on site not earlier that 1947, not eighty-five years ago (Petitioner's Brief, p. 2) or "around the turn of the century (1900)" as alleged (App. B: p. 10a).

2. As part of the Town's landfill capping procedure, the Town contracted with an independent contractor to supply materials and did not, as alleged, contract with the Petitioner for this purpose. That contractor purchased at least some of the sand and gravel for the project from the Petitioner (App. B: p. 10a).

3. Contrary to Petitioner's brief, the trial court did not find the 1929 zoning by-law unconstitutional. Rather, he found

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[4] Rule 27.1 (a) of the Massachusetts Rules of Appellate Procedure states in part: "Application; When Filed; Grounds. Within twenty days after the date of the rescript of the Appeals Court any party to the appeal may file an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice ..."

that it "runs afoul of the zoning enabling act of the era."(App. B: p. 15a).

4. Petitioner alleges, in essence, the mental incompetence of trial counsel (Attorney Downes). Respondent points out that trial counsel engaged in a three-day trial and competently brought forth many issues for the court's consideration. Trial counsel then prepared an extensive brief for the Commonwealth's Appeals Court and joined present counsel in argument there. In the meantime, present counsel entered a general appearance before the Appeals Court and never raised the issue of trial counsel's alleged incompetence by way of appropriate motions until submitting a written request for a re-hearing submitted to a single justice of the Appeals Court.

5. Petitioner alleges that two disinterested witnesses whose affidavits are before this Court document pre-1929 commercial activity on site and the brief suggests that one of the individuals at one time occupied an official position apparently with the Respondent Town (Petitioner's Brief, p. 4). In fact, an examination of Petitioner's affidavits reveals no support for this latter representation. Additionally, the affidavits are very general and provide no illumination as the location or extent of any mining operations supposedly observed by these alleged witnesses. Additionally, there is no showing or allegation that these individuals were unavailable, unknown, and/or not susceptible of identification before trial.

6. Petitioner alleges the all commercial uses on the property are precluded by the Appeals Court decision and the decision amounts to an inverse condemnation. The bald statement is unsupported by any expert engineering or appraisal data. There is no evidence offered as to suitability of the property for the permitted uses that include the single-family residential use.

REASONS TO DENY THE PETITION

There is no federal question whatsoever presented nor has Petitioner shown any compelling reason to grant the Petition.

I. The Decisions Of The Supreme Judicial Court And Appeals Court Of The Commonwealth Of Massachusetts Are Entitled To A High Degree Of Deference.

The narrow question before this Court is whether the Supreme Judicial Court of Massachusetts appropriately exercised its discretion in denying an Application for Further Appellate Review (FAR) filed almost three years after the decision of the Commonwealth's Appeals Court. This Court has long and consistently ruled that it will not upset a lower court decision if it was properly within the reasonable exercise of the lower court's discretion. See *Cheang-Kee v. United States*, 70 U.S. 320 (1865) where the Court noted at page 326 that "... matters wholly within the discretion of the Circuit Court ... are not reviewable here."

A. The granting of a FAR Application must be founded upon substantial reasons affecting the public interest or the interests of justice.

The decision to grant a FAR application is a discretionary function of Court[5].

Rule 27.1 of the Massachusetts Rules of Appellate Procedure makes it clear beyond debate that, in order for a FAR application to be granted, the questions presented must conjure judicial visions of matters that are truly consequential for the public interest or are vital to the interests of justice. The Supreme Judicial Court is in the best position to determine whether this test has been met and the denial of the application without comment speaks loudly to the Court's negative conclusion.

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[5] As the 1973 Reporter's Notes to Massachusetts Rules of Appellate Procedure Rule 27.1 observe, "Further review is analogous to the granting of certiorari by the Supreme Court of the United States." Granting of an application for further appellate review requires a vote of three justices of the Supreme Judicial Court (Mass. R. App. P. 27.1(e)).

B. Whether ruling on the merits or on the Petitioner's procedural lapses, the Supreme Judicial Court exercised its FAR discretion reasonably.

1. Substantively, the validity of a zoning enactment in Massachusetts that breaks an entire town into two zoning districts, business and residential, is well settled and in accord with the Appeals Court decision in this matter.

This is nothing more than a garden-variety zoning case. The Town's 1929 by-law classified the entire town into either a business or a residential district. Then-existing business property was zoned business. The balance of the Town was zoned residential.

In ruling that the 1929 enactment was legal and in rejecting Petitioner's claim of spot-zoning, the State Appeals Court followed a well-established line of precedent in the Commonwealth. See *Gage v. Egremont*, 409 Mass 345, 566 N.E. 2d 1597 (1991) where a zoning by-law remarkably similar to Barnstable's 1929 by-law was upheld by the Supreme Judicial Court. In rejecting further review of the Appeals Court decision on the merits of this action, the Supreme Judicial Court was not venturing into uncharted waters and was well within precedent to do so.

Petitioner's attack on the town's 1929 zoning enactment is further hobbled because it presented no credible evidence to the Trial Court regarding its pre-1929 commercial activities, either because it had none or because it chose to focus on the 1956 zoning amendment and subsequent on-site activity. See Petitioner's comment on its choice of tactics as

contained in its brief in support of its application for FAR, attached and discussed in footnote 2, above.

This tactical trial decision was made at Petitioner's peril and compelled the trial court to rule that this virgin land was partially converted to commercial activities not earlier than 1947. This finding of fact is absolutely fatal to Petitioner's claim that it can mine its entire property, not just the five acre site.

There was nothing presented to the Supreme Judicial Court on the merits that would require a finding that matters presented were vital to the public interest or that would affect the interests of justice. Given the high bar set for the granting of a FAR application, the Supreme Judicial Court was not only well within the limits of its discretion in rejecting the application, but was virtually required to do so.

2. Procedurally, rejecting a FAR application presented two years and nine months late is certainly within the proper exercise of the Supreme Judicial Court's discretion.

Procedurally, either a late FAR application to the Supreme Judicial Court or a late motion for re-hearing presented to the Appeals Court would be fatal to Petitioner's claim.

Here, the more deadly lapse involves Rule 27.1 of the Massachusetts Rules of Appellate Procedure. It requires that an application for FAR be filed with the Supreme Judicial Court within twenty (20) days of a decision of the lower Court. See footnote 3, above. This FAR petition was filed, not twenty *days*, but *two years and nine months* after the decision on the merits of the case by the Appeals Court.

While Petitioner argued before the Supreme Judicial Court in its FAR Application that successor counsel (an Attorney Joseph Runci) did nothing (including filing an appearance as successor counsel) before Runci's untimely death, and now continues to argue that his co-counsel (Attorney Downes) did nothing because of incapacity, Petitioner ignores the fact that its current counsel remained counsel of record before the Appeals Court, that current counsel had announced his intention to file a FAR application well before the Appeals Court had finally ruled on the case, and that current counsel filed nothing to elicit support from the Supreme Judicial Court to extend the FAR filing deadline for thirty-three months.

If there was ever a textbook example of a self-inflicted procedural wound that is, will always be, and should be fatal, this case is a prime example of it. On this reason alone, Massachusetts' highest court was well within the limits of its discretion in denying the FAR application.

3. Procedurally, a late motion for re-hearing with the State Appeals Court would justify both the Appeals Court denial of the motion and the refusal of the Supreme Judicial Court to further review the matter.

If the focus of review is on the Supreme Judicial Court's affirmation of the Appeals Court denial of Petitioner's Motion for Re-hearing, the result is and should be the same.

In the Appeals Court action, Petitioner's current counsel filed a request to a justice of the state Appeals Court to extend the time for filing a petition for re-hearing. This request was allowed and gave the

Petitioner more than three weeks to file its motion with a date-certain for filing specified in the order.

As the Appeals Court docket makes so painfully clear, Petitioner then missed the filing deadline by one day. Without moving the Court to further extend the deadline and without explanation for the delay, Petitioner nevertheless filed its Motion for Re-hearing. To no one's surprise, save only that of the Petitioner, the motion for re-hearing was denied without explanation or comment.

Once again, in tacitly accepting the Appeals Court ruling, Massachusetts' highest court would be and was well within the limits of its discretion in denying the FAR application.

Based on either the substantive or procedural conclusions that Respondent respectfully argues should be drawn at this point, this Court's inquiry ought not to proceed further. The Petition for Writ of Certiorari is without merit and should be denied without further inquiry.

However, because Petitioner raises other ancillary issues in its brief, Respondent will offer the following observations.

II. Petitioner's Demand Amounts To A Motion For A New Trial. It Is Seven Years Late And Unsupported.

Rule 60(b) of the Massachusetts Rules of Civil Procedure discusses the granting of new trial.[6] A

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[6] In relevant part, Rule 60(b) notes, "On motion and upon such terms as are just, the court may relieve a party or his representative from a final judgment ... for the following reasons: (1) mistake, inadvertence, surprise, or ***excusable neglect***; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); ... (6) ***any other reason justifying relief from the operation of***

motion for relief from judgment or order is addressed to the trial judge's discretion and is generally not reviewable except for a clear abuse of discretion. See Reporter's Notes – 1973, citing *Farmers Co-operative Elevator Association v. Strand*, 382 F.2d 224 (8th Cir. 1978).

Thus, a motion to set aside the judgment for "excusable neglect" or for "newly discovered evidence" should have been presented to the trial judge within one year of entry of judgment. Petitioner offers no explanation as to why such a motion could not have been filed with the trial judge in this time frame. To ask for a new trial now is untimely and not presented to the appropriate court.

A. There is no record to support the assertion that "new" evidence offered by affidavit could not have been discovered before trial.

As the Reporter notes, "The movant bears the burden of showing that the evidence could not have been discovered by due diligence in time to move for a new trial under Rule 59(b)" quoting *Flett v. W.A. Alexander & Co.*, 302 F. 2d 321, 324 (7th Cir.), *cert. denied* 371 U.S. 841, 83 S. Ct. 71, 9 L.Ed.2d 77 (1962):

> "Rule 60(b) provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances."

As the affidavits presented in the record demonstrate, both affiants are life-long residents of Cape Cod and presumably were available to trial

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the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment ... was entered..." (Emphasis provided.)

counsel before and during the trial of this action. Certainly, there has been no demonstration in the record that Petitioner was excusably ignorant of the existence of this evidence. *Brown v. Penn. R.R.*, 282 F.2d 522 (3rd Cir. 1960), *cert. denied* 365 U.S. 818, 81 S. Ct. 690, 5 L.Ed.2d 696 (1961).

B. Even if timely presented, the "new evidence" proffered in affidavits would not support a motion for new trial.

In requesting a new trial, the Reporter notes that Petitioner must show that "the evidence must be of a material nature and so controlling as probably to induce a different result", citing *Giordano v. McCartney*, 385 F.2d 154 (3rd Cir. 1967).

Here, the trial court found that site-specific testimony showed that the property was virgin land in 1947. And an aerial photograph from 1956[7] is in stark contrast to the vague recollections and generalizations of affiants who are now aged 87 and 91 whose recollections were formed between ages 6 to 10 (App. D, Rennie affidavit) and at age 5 (App. E, Ellis affidavit). And neither affidavit expressly ties the observations to a specific parcel of land, or any specific portion thereof.

Additionally, it can hardly be said that the affidavits would outweigh the photographic evidence before the trial court, evidence that directly contradicts the substance and implications of these affidavits. The *Giordano* standard has not been met and these affidavits are insufficient to support a motion for new trial.

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[7] The trial court refers to this photo as a 1964 photo (Trial Exhibit 25) although it was actually taken in 1956. See Appendix B, Page 8a, Finding number 6. The Town's motion to correct the record was not acted upon.

C. Incompetence of Trial Counsel: Even with no express time constraints to raise this matter, the trial judge has never been asked to do so.

While motions for new trial based on newly discovered evidence or excusable neglect face a one year time restriction, a Rule 60(b)(6) motion asking for a new trial for ***"Any other reason justifying relief from the operation of the judgment"*** has no such time limit. It must be presented simply within a **"reasonable time"**.

Relief from judgment based on trial counsel's alleged disability would certainly be cognizable and no doubt reviewed by the trial judge with concern, if not sympathy, under Mass. R. Civ. P. Rule 60(b)(6).

Inexplicably, Petitioner has never broached the subject of trial counsel's alleged incapacity with the trial judge, choosing instead to ask appellate courts for that relief. Obviously, the trial judge would have been in the best position to have observed trial counsel's demeanor and competence. Nevertheless in spite of, or perhaps precisely because of, the trial judge's vantage point, Petitioner has avoided asking for Rule 60(b)(6) relief altogether.

Nor has Petitioner presented any expert medical evidence by affidavit or otherwise that supports the allegation that counsel was medically disabled prior to or during trial.

Finally, it should be observed that if trial counsel was not disabled until some time post-trial, subsequent disability while regrettable would not *per se* be a basis for reopening the trial.

On the state of the record, one can only guess at the state of trial counsel's was at any point in time. When being asked to overturn the decisions of both a trial court and an appeals court for such an

extraordinary reason, both this Court and the Supreme Judicial Court are entitled to a far more robust record on the subject than presented here.

III. Neither Enactment Nor Enforcement Of A Valid Zoning Ordinance Is A Taking.

A. Adopting town-wide zoning that prohibits certain activities is clearly a permissible undertaking.

By their very nature, zoning enactments allow some activities and deny, restrict, or condition other activities. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The fact that certain uses within a given zone may be eliminated or constricted does not give rise to a claim for condemnation as long as there are some activities and associated inherent value to which the property can still be put. See *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365 (1926); *Daddario v. Cape Cod Commission*, 425 Mass. 411 (1997).

B. Affirming the ban of commercial activities on locus is neither a taking nor an inverse condemnation.

Here, Petitioner apparently claims (Petitioner's Brief, p. 7) that the decisions of the Massachusetts Courts, when applied to Petitioner's property, work to effectively produce an inverse condemnation. At least as described in Petitioner's brief, it is not an action of the municipal Respondent that is objected to, but rather the *effect* that the judicial process will have on Petitioner's land that is problematic.

The axiom, "no action, no taking", applies. The fact that Petitioner's illegal use of the property is declared

illegal, combined with the fact that Petitioner has supposedly destroyed its property such that only illegal use of locus will render value to Petitioner, is neither the Town's responsibility nor a compensable event.

C. The taking claim is not ripe because there has been neither pursuit nor denial of just compensation.

In an action where inverse condemnation is claimed, it is incumbent upon the property owner to pursue available remedies for just compensation. Otherwise, a constitutional claim will be deemed premature. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

Massachusetts has such a process and that process has been found to be adequate. *Marietta Realty, Inc. v. Springfield Redevelopment Authority*, 902 F. Supp. 310 (D. Mass. 1995).

Having failed to pursue compensation, Petitioner's constitutional claims should not lie.

D. It is factually untrue that Petitioner has no other uses for its property.

Petitioner' brief asserts (Brief, p. 7) that it has no practical ability to use its property unless allowed to mine it in violation of applicable zoning. That assertion is simply inaccurate.

As a matter of right, current zoning allows Petitioner to use the property as a single lot for single family housing. Even with some costs for restoration and landscaping (made necessary only because of Petitioner's rapacious use of the land), a sixteen acre, single family lot on Cape Cod today is worth a small

fortune. There has been no demonstration by Petitioner at any level of the proceedings to support the bald claim that restricting use of the property to residential renders it worthless.

Additionally, existing permits allow some commercial use of locus. The fact that the permits have a limited life does not mean that they cannot be fully enjoyed at the present time.

E. Petitioner has not pursued or exhausted its range of remedies that would infuse value into its property.

Petitioner has never attempted to explore alternative administrative or legislative relief with the Respondent Town. With more than sixteen acres available to be subdivided and sold off, there has been no effort to do so. The inherent value of real property on Cape Cod in general, and perhaps to abutters in particular, remains unexplored.

As mentioned previously, the property enjoys the benefit of permits that allow some commercial activity at locus. No attempt to extend or modify these permits for other uses has been explored. Other development options that need not be explored here are also potentially available. See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); see also *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986) where the Court noted the need to exhaust administrative remedies to determine whether a regulation amounted to a taking, and said, "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."

Petitioner's lack of initiative and imagination do not equate to a denial of any practical use of the property.

CONCLUSION

The Petitioner has achieved the dubious accomplishment of having so badly and illegally managed its land that Petitioner now asserts the property is no longer suitable for its one legal use, single-family residences. If that were not enough, Petitioner now seeks to have the Town compensate it for its own mis-management. One is reminded of the old saw about the child who, having dispatched his parents, now claims the court's mercy because he has recently been orphaned.

There is simply no Federal issue presented that has not been thoroughly resolved for years nor are there any other compelling reasons to grant this Petition. There comes a time when a case needs to be finally resolved; in this action, that time is long past. Therefore, the Respondent respectfully requests that this Petition be denied.

Respectfully submitted,

ROBERT D. SMITH, Town Attorney,
Counsel of Record

T. DAVID HOUGHTON,
First Assistant Town Attorney

CHARLES S. McLAUGHLIN, Jr.
Assistant Town Attorney

RUTH J. WEIL
Trial Counsel

TOWN OF BARNSTABLE
367 Main Street, New Town Hall
Hyannis, Ma. 02601-3907
508-862-4620; 508-862-4724 Fax

June 2006

APPENDIX TABLE OF CONTENTS

APPENDIX A

Letter to Supreme Judicial Court from Attorney James W. Stathopoulos, dated December 11, 2002 ..... 1a

APPENDIX B

Appellant's Motion to Enlarge Time filed with the Appeals Court, dated October 7, 2005 ..... 3a

APPENDIX C

Barnstable Superior Court Docket Entries 10a

APPENDIX D

Appeals Court Docket Entries 15a

APPENDIX E

Supreme Judicial Court Docket Entries 21a

APPENDIX A

Law Offices of
James W. Stathopoulos

All Correspondence to:

METRO NORTH
MAPLE STREET-ROUTES 128 @ 93
STONEHAM, MASSACHUSETTS 02180
TEL (781) 438-3661 FAX (781) 438-3205

METRO BOSTON
40 BROAD STREET, SUITE 805
BOSTON, MASSACHUSETTS 02109
TEL (617) 423-0001 FAX (617) 423-0009

METRO SOUTH-CAPE COD
MERCHANT SQUARE
SANDWICH, MASSACHUSETTS 02563
TEL (508) 888-0404 FAX (508) 833-0303

RECEIVED
DEC 26 2002
TOWN ATTORNEY
TOWN OF BARNSTABLE

December 11, 2002

Susan Mellen, Clerk
Supreme Judicial Court
1300 New Court House
Pemberton Square
Boston, MA 02108

RE: Gifford Brothers Sand and Gravel, Inc. v. Zoning Board of Appeals of Barnstable No. 2000-P-0701

Dear Ms. Mellen:

I received the Appeals Court decision in the above referenced matter on Tuesday, November 19, 2002 at my Boston office on Broad Street, the same address that I provided to the Appeals Court on the intake/appearance form provided to me on the day of argument. The decision had multiple postmarks and had been addressed to a Hyannis office that I had used thirteen years ago.

The Appeals Court (see attached Notice of Docket Entry) has allowed my Motion to Enlarge Time (also attached).

I am writing to confirm the above because at this time it is my intent to file a Rule 27 petition for rehearing and a Rule 27.1 application for further appellate review. In order to properly comply with the requirements of said rules, I will require additional time in which to file the complete application for FAR. Having just received a copy of the transcript and briefs in this matter and with the upcoming holiday season and four school age children, I cannot see how I could possibly file the application prior to January 15, 2003 and intend to file same along with a Motion to Enlarge Time therefore, on said date.

I appreciate your assistance herein.

Sincerely,

James W. Stathopoulos

JWS/jw
CC: Ruth J. Weil, Esquire, Gregory M. Downs, Esquire

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

APPEALS COURT DOCKET #2000-P-0701
(SUPERIOR COURT DOCKET #98-87)

* *

GIFFORD BROTHERS *
SAND & GRAVEL, INC., *
APPELLANT *
*
V. *
*
TOWN OF BARNSTABLE *
ZONING BOARD OF APPEALS, *
APPELLEE *

* *

APPELLANT'S MOTION TO ENLARGE TIME

Now comes GIFFORD BROTHERS SAND & GRAVEL, INC., Appellant herein, and moves that this Court allow Appellant to enlarge the time for filing a MRAP Rule 27.1 Application for Further Appellate Review. As grounds herefor the Appellant states as follows:

1. Appellant's original Counsel Gregory Downs, Esquire, the attorney who actually tried the case in the Barnstable Superior Court, filed an appeal of the Superior Court Justice's decision which permitted Appellant to use only a portion of his property for commercial purposes.

2. Mr. Downs appealed that decision seeking a ruling that the entire property be commercially utilizable.

3. At the time of the trial and clearly by the time of the appeal to the Appeals Court Mr. Downs had been and is still suffering from a debilitating illness and is no longer able to practice law.

4. Christopher Keyes, President of Appellant Gifford Brothers prevailed upon Attorney James Stathopoulos, to assist Appellant and Mr. Downs by filing a Petition for Rehearing with the Appeals Court. Mr. Stathopoulos did so but without the benefit of Mr. Downs' files or assistance both of which were unavailable at the time, and the petition was denied.

5. Mr. Stathopoulos, upon the receipt of the notice of denial of the Petition for Rehearing attempted to file a request to enlarge time for the filing of an Application for Further Appellate Review but was informed by the Clerk's Office that such motions are not accepted except when simultaneously accompanied by the actual Application FAR itself.

6. Mr. Stathopoulos informed Appellant of the above and Appellant then retained successor counsel, Joseph Runci, Esquire for the purpose of filing the Application for FAR.

7. Attorney Runci informed Appellant that Runci had requested case files from Attorney Downs.

8. Mr. Downs, suffering from mental difficulties, initially provided nothing, procrastinated for months and avoided communication.

9. Benjamin Losordo, Esquire (Attorney Downs' former partner) though himself plagued by serious health problems (requiring multiple oncology-related hospitalizations and who is at this time in-patient at Brigham & Womens Hospital) was at that time still able to assist Mr. Downs in the process of locating Appellant's files in this matter.

10. Attorney Losordo, who has filed an affidavit in support of this motion attached hereto as Exhibit A, went to Mr. Downs' home on several occasions and eventually compiled a box containing what is believed to be the bulk of Appellant's files.

11. Mr. Lorsordo turned over possession of the said files to Appellant's successor Counsel, Joseph Runci, Esquire.

12. Appellant was under the assumption that Attorney Runci had filed an Application for FAR. Awaiting a decision, the Appellant has continued to operate his facility at the locus under the terms of the trial Judge's order and has done so with the full knowledge of the Appellee.

13. What work Attorney Runci (who at the time was leasing space in an office suite owned by Attorney Shaun M. Ellis in Sandwich, MA) actually performed, if any, is unknown.

14. On September 29, 2003, Attorney Ellis' wife and an employee both discovered Attorney Runci deceased, and locked in his office. As a result Ellis' office operated on a limited basis for several months until the attorneys and other staff were able to recover from the shock of what had occurred.

15. In July of this year after returning from a week's vacation Attorney Ellis discovered that his office condominium had been flooded. As a result of the cleanup that ensued Mr. Ellis discovered a box of files in the storage area of the cellar of his office that appeared to have been the box that was provided by Attorney Losordo to Attorney Runci. Mr. Ellis saw that Appellant's name was on some of the documents and contacted Appellant. Attached hereto as Exhibit B is Mr. Ellis' Affidavit.

16. Appellant directed Mr. Ellis to contact Attorney Stathopoulos and turn over the documents to Stathopoulos. The documents had an extremely high degree of water content and the vast majority were stuck together and very difficult to decipher.

17. Attorney Stathopoulos reviewed the contents of the box provided to him and came to the conclusion that the documents contained therein comprised the files that Mr. Downs had used at the time of the trial of this matter. There were no appellate documents of any kind.

18. Attorney Stathopoulos informed Appellant of these facts and Appellant requested that Attorney Stathopoulos file this Motion to Enlarge Time and the accompanying Application FAR.

19. The gravamen of the case is whether ongoing commercial operations at the locus owned by Appellant pre-existed Appellee's 1929 zoning ordinance.

20. The trial judge, a long-time attorney and resident of Cape Cod and a person himself familiar with the area of the locus found that there was a valid existing commercial use.

21. Attorney Downs had informed Appellant that the trial judge had suggested pre-trial that the Judge was not as concerned with the commercial status of the property circa 1929 but was more focused on the question of the type of commercial activity circa 1956, (a time when Appellee had enacted an even more comprehensive zoning ordinance/map) so that the Judge could make a determination regarding what portion of the locus on which he would allow certain uses.

22. Both trial attorneys and the Court therefore focused on the nature of the operations in place circa 1956 and not much evidence, for or against, was adduced by either party as to the status quo circa 1929. Moreover the trial Judge found the 1929 ordinance to be constitutionally defective.

23. The Appeals Court however, eventually determined the 1929 ordinance to be valid.

24. Appellant has researched and investigated the availability of living witnesses to corroborate the commercial operations ongoing at the locus (which was at one point comprised of land in both Barnstable and Sandwich) prior to the 1929 act.

25. Appellant has located Robert Ellis, a resident of Sandwich and a former Chairman of the Board of Health for that town (having been a member of the Board for over thirty years), who clearly remembered substantial

commercial operations at the locus, from 1924 to the present time. Robert Ellis' affidavit is attached to the Appellant's Application for FAR filed herewith.

26. Appellant also located Francis Rennie, a resident of the Town of Barnstable, who remembered substantial commercial operations at the locus since 1920 and who also knew the owner of the locus at the time of the Appellee's 1929 zoning enactment. Francis Rennie's affidavit is attached to the Appellant's Application FAR filed herewith.

27. It now appears that there are additional octogenarians who are of sound mind and good memory that will be able to corroborate the testimony of Mr. Rennie and Mr. Ellis. Current counsel is working diligently to compile a list of additional affiants who can testify to ongoing commercial operations at the locus pre-1929 to present.

28. The trial Judge found the commercial operations at the locus to be continuous and ongoing for his purposes.

29. There appears to be absolutely no doubt that the subject locus had ongoing and valid commercial uses pre-existing the Appellee's 1929 ordinance.

30. Were the Appellee to argue that this information is untimely the Appellant would suggest (a) the extreme incapacity and/or death of two of Appellant's prior attorneys should not be held against Appellant; (b) no party is prejudiced; (c) there are a significant number of living eye-witnesses that can corroborate the existence of pre-existing

commercial uses and (d) it would be unjust to deny the obvious truth of all of the above and allow clear error to become law.

31. It appears that justice would require the consideration of the Appellant's Application for Further Appellate Review coterminously filed herewith. The enlargement will allow the truth to come out and give Counsel the means to adequately and properly present the Appellant's issues to the Court.

Wherefore the Appellant request that this Court allow Appellant to enlarge the time for filing a MRAP Rule 27.1 Application for Further Appellate Review.

Respectfully submitted,

/s/ James W. Stathopoulos, Esquire
BBO#477480
Attorney for Appellant
43 Kingston Street
Boston, MA 02109
(617) 423-0001

Dated: October 7, 2005

APPENDIX C

GIFFORD BROTHERS SAND AND GRAVEL, INC.
vs.
ZONING BOARD OF APPEALS,
TOWN OF BARNSTABLE

Sandwich

$185 paid
$50 PI paid

Commonwealth of Massachusetts
Barnstable, SS
Superior Court for Civil Business

Counsel for Plaintiff

Gregory M. Downs
Losordo & Downs
P.O. Box 1637
78 Route 6A
Sandwich 02563
(508-888-6067)

Counsel for Defendant

Robert D. Smith
Ruth J. Weil
Town of Barnstable
367 Main Street, New Town Hall
Hyannis, MA 02601-3907
790-6280

ACTION AND DEMAND

Zoing Appeal/Declaratory Judgment

1998

Feb. 9, No. 1 – Complaint

Feb. 9, No. 2 – Plaintiff's statement pursuant to S.C. Rule 29

Feb. 20, No. 3 – Plaintiff's affidavit of notice pursuant to G.L. c. 40A, § 17

March 20, No. 4 – Appearance of Robert D. Smith and Ruth J. Weil for defendant

Oct. 15, No. 5 – Defendant's motion for preliminary injunction, memorandum in support, with affidavits in support

Oct. 15 – Order of notice issued returnable on October 22, 1998

Oct. 22, No. 6 – Defendant's affidavits (2) in support of #5

Oct. 22, No. 7 – Plaintiff's memorandum in opposition, with affidavits (2) in support of opposition of #5

Oct. 22 – Motion #5 allowed in accordance with paragraph one only to the description of property, by the Court, O'Neill, J.

Oct. 22, No. 8 – Interlocutory order on preliminary injunction, by the Court, (O'Neill, J.) (copy to attys.)

Dec. 16, No. 9 – Pre-trial conference scheduled for February 3, 1999, at 2:00 p.m., by the Court, Connon, J. (copies to atts.)

1999

Feb. 3, No. 10 – Pre-trial orde--joint pre-trial memo. filed; case assigned for trial on April 27, 1999, at 9:00 a.m.; by the Court, Connon, J. (copy to attys. 2/5/99)

March 31, No. 11 – Defendant's motion in limine with statement of reasons to exclude testimony of expert witnesses in support, plaintiff's opposition

April 27, No. 12 – Abutters motion to intervene as party defendants filed and denied, by the Court, Nickerson, J.

27, No. 13 – Trial without jury (Nickerson, J.)

27, No. 14 – Defendants' motion for view filed and allowed, by the Court, Nickerson, Jr.

25, No. 15 – Findings of fact, rulings of law, by the Court, Nickerson, J. (copies to attys.)

April 27, No. 16 – Defendants' request for findings of fact and rulings of law

July 21, No. 17 – Judgment on findings by the Court (copy to attys.)

26, No. 18 – Plaintiff's motion to reconsider, alter or amend judgment with opposition

August 2 – Motion #18 denied without prejudice, S. C. rule 26: Arthur D. Little Inc. v. East Cambridge Savings Bank 35 Mass. App. 734, 742; by the Court, Nickerson, J. (copy to attys. 8/5/99)

" 9, No. 19 – Plaintiff's motion to reconsider, alter or amend judgment with opposition and deft's memorandum in support of opposition

" 17 - Motion #19 denied, without prejudice, S. C. Rule 26 Arthur D. Little Inc. v. East Cambridge Savings

" 10, No. 20 – Plaintiff's notice of appeal (Mr. Justice Nickerson notified and copy to atty – 10/21/99)

"16, No. 21 – Defendant's notice of appeal (Mr. Justice Nickerson notified and copy to atty. 10/21/99)

November 15, No. 22 – Complaint for contempt, affidavit in support

November 17 – Summons to issue ordering plaintiff to appear for the purpose of holding a hearing on the merits of the contempt complaint, returnable at Barnstable, Wednesday, November 24, 1999, at 2:00 p.m., by the Court, Nickerson, Jr.

November 17 – Summons on complaint issued

December 12, No. 23 – Plaintiff's certificate re ordering transcript

December 19, No. 24 – Defendant's certificate re not ordering transcript

December 23, No. 25 – Civil contempt summons returned with service made on plaintiff and Christopher Keyes on Nov. 18, 1998

December 23, No. 26 – Answer to contempt complaint by Christopher Keyes, President of plaintiff corporation by Gregory M. Downs

December 23, No. 27 – Contempt hearing (Nickerson, J.)

Findings on contempt hearing on record

December 24, No. 28 – Judgment on contempt (copy to attys.)

2000

January 8 - No. 29 - Transcript of testimony (1 volume)

March 28, No. 30 - Transcript of testimony (2 volumes)

April 10 - Attorneys and Clerk of the Appeals Court notified record assembled in accordance with Appellate Rule 9.

A true copy, Attest:

/s/ Phyllis A. Day, Clerk

APPENDIX D

APPEALS COURT
Panel Cases
Case Docket

GIFFORD BROTHERS SAND & GRAVEL vs.
BARNSTABLE ZONING BD. OF APPEALS TOWN OF
2000-P-0701

CASE HEADER

Case Status	Closed: Rescript issued
Nature	Zoning appeal: c40A
Sub-Nature	declaratory judgment
Appellant	Both Plf & Deft
Brief Status	
Panel	Gelinas, Kantrowitz, Doerfer, JJ.
Citation	56 Mass. App. Ct. 1105
Lower Court	Barnstable Superior Court
Lower Ct Judge	Gary A. Nickerson, J.
Status Date	12/27/2005
Entry Date	04/20/2000
SJ Number	
Case Type	Civil
Brief Due	
Argued/Submitted	04/10/2002
Decision Date	10/28/2002
TC Number	98-87
TC Entry Date	02/09/1998

ADDITIONAL INFORMATION

FAR docket number is FAR-15086.

INVOLVED PARTY

Gifford Brothers Sand & Gravel
Plaintiff/Appellant
Blue brief & appendix filed
3 Extensions, 127 Days

ATTORNEY APPEARANCE

Gregory M. Downs, Esquire
James W. Stathopoulos, Esquire

INVOLVED PARTY

Barnstable Zoning Bd. of Appeals Town of
Defendant/Appellee
Red brief filed
1 Extension, 27 Days

ATTORNEY APPEARANCE

Ruth J. Weil, Esquire

DOCKET ENTRIES

06/01/2000 - **** Cross Appeal ****

10/04/2000 – Briefs located in Room 952: Cab 1; shelf 1.

04/20/2000, #1 – Entered.

05/30/2000, #2 – Motion to docket cross-appeal late, filed by Gifford Brothers Sand & Gravel.

05/30/2000, #3 – MOTION to extend brief & appendix due date, filed by Barnstable Zoning Bd. of Appeals Town of:

06/01/2000 – RE#2: The motion to docket the appeal late is allowed and the appeal of the plaintiff is entered this date. Pursuant to Mass.R.A.P. 16(i), the plaintiff

shall be deemed the appellant unless the parties otherwise agree. Appellant's brief & appendix are due 6/30/00. (Lenk, J.) *Notice.

06/02/200 - RE:#3 See this court's action of 6/1/2000 on paper #2. *Notice.

06/05/2000, #4 - Response to #2, filed by Barnstable Zoning Bd. of Appeals.

06/08/2000 - RE#4: The within is treated as a motion for reconsideration and is denied. (Lenk, J.) *Notice.

06/21/2000, #5 - Joint motion to enlarge time for filing briefs.

06/21/2000 - RE#5 The appellant shall file the brief & appendix on or before 8/29/00. No further enlargements. The appellee's request for enlargement is denied without prejudice to refiling after the appellant files the brief & appendix. Notice.

09/08/2000, #6 - Letter from Atty Weil re: Status of case.

09/08/2000 - RE#6 The time period for appellee's due date does not begin to run until the appellant's brief & appendix are accepted & docketed. Notice.

09/21/2000 - Notice preceding dismissal: Rule 17A.

10/04/2000, #7 - MOTION to extend conforming brief & conforming appendix due date, filed by Gifford Brothers Sand & Gravel, Inc.

10/04/2000 - RE#7: Allowed to 10/04/2000. *Notice.

10/04/2000, #8 - SERVICE of brief & appendix for Plaintiff/Appellant Gifford Brothers Sand & Gravel (2 vols appx and 1 vol exhibits).

10/10/2000, #9 – RESPONSE to paper #7 filed by Zoning Board of Appeals, Town of Barnstable.

10/16/2000, #10 – MOTION to extend brief due date of Town of Barnstable Zoning Bd. of Appeals.

10/20/2000 – RE#10: Extension to 11/30/2000 granted for filing of brief of Barnstable Zoning Bd. of Appeals Town of, Defendant/Appellee. Notice to counsel.

10/20/2000 – RE#9 Treating the within as a motion to strike pages E5 and E6 of the appellants' Exhibit volume for the reason that the documents are not part of the record below and to correct the date on pages E23 and E24 from 1955 to 1968, it is referred to the panel assigned to decide the appeal. *Notice.

11/30/2000, #11 – SERVICE of brief for Defendant/Appellee Barnstable Zoning Bd. of Appeals Town of.

03/19/2002, #12 – Notice of 04/10/2002, 9:30 A.M. argument sent.

03/21/2002, #13 – Letter pursuant to MRAP 16(l) filed by Barnstable Zoning Bd. of Appeals.

04/10/2002 – Oral argument held. (GS KN DO).

10/28/2002 – RE#9 (Revised Action). Allowed. (Gelinas, Kantrowitz, Doerfer, JJ.) *Notice.

10/28/2002, #14 – Decision: Rule 1:28 (GS KN DO). The judgment of the Superior Court is modified by striking the clause in paragraph 1 that begins with "except" and ends with "1956." As so modified, the judgment is affirmed." *Notice. (See image on file.)

11/18/2002 – Mail to Atty Stathopoulos returned – resent to new address.

11/25/2002 – RESCRIPT to Trial Court.

11/26/2002, #15 – Letter from James W. Stathopoulos, Esquire re: received decision on 11/19/02; and require the benefit of the full 14 and 20 day periods to file Petition for Rehearing and Further Appellate Review.

11/27/2002 – RE#15 Either a M.R.A.P. 27 or 27.1 filing should be accompanied by a motion to enlarge setting out the within, note the rescript issued to the trial court on 11/25/02. *Notice.

12/09/2002, #16 – Motion to enlarge time for filing an MRAP Rule 27 petition for rehearing and a Rule 27.1 application for further appellate review, filed by Gifford Brothers Sand & Gravel.

12/10/2002 – RE#16 Appellant may file his petition for rehearing on or before 12/19/02. Any request for an enlargement of time to file an application for F A R must be made to SJC. (Gelinas, Kantrowitz & Doerfer, JJ.) *Notice.

12/20/2002, #17 – PETITION for Rehearing, filed by Gifford Brothers Sand & Gravel.

01/09/2003, #18 – ORDER: Denial of petition for rehearing. (GS-KN-DO, JJ.) *Notice/Image.

10/27/2005 – Copy of FAR application of Gifford Brothers Sand & Gravel.

12/27/2005 – FAR DENIED (on 12/21/05).

APPENDIX E

SUPREME JUDICIAL COURT
For the Commonwealth
Case Docket

GIFFORD BROTHERS SAND AND GRAVEL, INC. vs.
ZONING BOARD OF APPEALS OF BARNSTABLE
FAR-15086

CASE HEADER

Case Status	FAR denied
Nature	Zoning appeal: c40A
Appeals Ct Number	2000-P-0701
Appellant	Both Plf & Deft
Citation	45 Mass. 1109
Full Ct Number	
Lower Court	Barnstable Superior Court
Status Date	12/21/2005
Entry Date	10/07/2005
Opposition Date	
Applicant	Plaintiff
Case Type	Civil
TC Number	98-87
Lower Ct Judge	Gary A. Nickerson, J.

INVOLVED PARTY

Gifford Brothers Sand & Gravel
Plaintiff/Appellant

ATTORNEY APPEARANCE

James W. Stathopoulos, Esquire
Gregory M. Downs, Esquire

INVOLVED PARTY

Barnstable Zoning Bd. of Appeals
Defendant/Appellee

ATTORNEY APPEARANCE

T. David Houghton, Esquire
Robert D. Smith, Esquire
Ruth J. Weil, Esquire

DOCKET ENTRIES

10/07/2005 – Docket opened.

10/07/2005, #1 – MOTION to file FAR application late, filed for Gifford Brothers Sand & Gravel by James W. Stathopoulos, Esquire. (Referred to the justices) Notice sent.

10/07/2005, #2 – FAR APPLICATION of Gifford Brothers Sand & Gravel, filed by James W. Stathopoulos, Esquire.

10/24/2005, #3 – OPPOSITION to Paper #1 (Appellants' motion to file FAR application late), filed for Barnstable Zoning Bd. of Appeals Town of by T. David Houghton, Esquire, Robert D. Smith, Esquire, Ruth J. Weil, Esquire. (Referred to the justices) Notice sent.

10/27/2005, #4 – Additional copies of the appellant's FAR application received this date. Only one copy was filed on 10/7/05.

11/03/2005, #5 – Additional copies of Appellee's Opposition to Motion to Enlarge time.

11/30/2005, #6 – Action on application deferred. (RA and Briefs requested from Atty. Stathopoulos.)

(12/13/05: Materials received from Atty. Stathopoulos.) 12/28/05: Materials returned to Atty. Stathopoulos.)

12/21/2005, #7 – DENIAL of FAR application.